2013 IL App (1st) 111771-UB

FIRST DIVISION
Filed April 23, 2013
Modified upon denial
of rehearing December 2, 2013

No. 1-11-1771

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C2 20274
	)	
FRANCISCO ROSA,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: In prosecution for possession of cocaine with intent to deliver, where the car containing hidden cocaine had recently been purchased by defendant, the trial court did not err in barring the defense from introducing a three-year-old cocaine possession conviction of a non-witness who defendant claimed sold the car to him two weeks before defendant's arrest.

¶ 2 In a bench trial, defendant Francisco Rosa was convicted of possession of less than 15 grams of a controlled substance (cocaine) and sentenced to 18 months in prison. On appeal, defendant contends that the trial court committed reversible error when it barred him from

introducing the three-year-old cocaine possession conviction of an individual who defendant claimed sold the car to him two weeks before defendant's arrest. Defendant also contends that the trial court erred in assessing a $200 DNA indexing fee against him because he was already registered in the DNA database pursuant to a prior conviction.

¶ 3 At trial, Lincolnwood police detective Jeff Gordon testified that about 8 p.m. on April 26, 2010, he was on patrol in his unmarked police car when he heard a radio call that a man was trying to pull a woman into a black Land Rover. Detective Gordon drove to the location, which was about two blocks away in Skokie. He saw a woman standing next to a black 2004 Land Rover,[1] apparently arguing with somebody in the car. When the car began to drive away, Detective Gordon stopped it and walked up to the driver's side. Defendant was driving, and Detective Gordon asked him for his driver's license and insurance card. The insurance card had defendant's name on it, and an effective date of April 13, 2010. However, when the detective "ran" the vehicle's registration number, it came back listing Nafees Usmani. Detective Gordon then smelled the odor of burnt cannabis coming from the car, so he called for a Skokie police canine unit. Within 10 minutes, a Skokie police officer arrived with a police dog. The officer walked the dog around the car and inside of it, and then told Detective Gordon that the dog displayed a "positive indication" on the center console and an area on the dash in front of the center console. Detective Gordon searched the center console and found that the trim plate around the gear shift lifted off. Inside, he found a clear plastic bag with a smaller clear knotted plastic bag of a white powder which he believed was cocaine. He performed a "cursory search" of defendant at the scene and found bundles of cash totaling over $3000. He then arrested defendant, who stated "I don't fuck with coke, I only fuck with weed." Detective Gordon then transported him to the Lincolnwood police station.

[1]The car was eventually identified as a Range Rover.

¶ 4 After the Range Rover was taken to the police station, Detective Gordon searched the area of the front dash where the police dog had "indicated." He found another piece of trim which lifted off to reveal a clear plastic bag containing three small knotted clear plastic bags of a white powder that he believed to be cocaine. The detective testified that he had custody of the bags of suspected cocaine until he placed them into a locked evidence storage unit at the police station. The parties stipulated that Mark Milford, a forensic scientist for the Northeastern Illinois Regional Crime Laboratory, would testify that the white powder weighed 4.52 grams and testified positive for cocaine. According to Detective Gordon, several days after this incident, Nafees Usmani came to the police station, seeking return of the car to him. He had a bill of sale indicating that he had sold the car to defendant on April 13, 2010, but he told the detective that defendant had only made a down payment on the agreed sale price.

¶ 5 Nafees Usmani testified for defendant and confirmed that he sold the Range Rover to defendant, whom he knew from high school. Nafees had purchased the car six months earlier from a car impound business dealing in cars seized by the police. Defendant gave him a down payment of $5,000, with a balance of $10,000. They agreed that defendant could use the car for a trial period so he could have it checked by a mechanic. They also agreed that if he did not like the car, he could return it. Nafees testified that the car had some electrical problems, but otherwise there was nothing wrong with its interior when he sold it to defendant. Nafees also testified that defendant did not inform him of any damage to the interior of the car. When the defense asked Nafees if his brother, Anees Usmani, had a prior conviction for possession of cocaine, the State successfully objected on the grounds of hearsay. Nafees testified that his brother's wife had driven the Range Rover; he had loaned it to her because she needed a car. He did not know if Anees had driven it. Nafees denied knowing about any hidden compartments in

the car and denied placing cocaine in the car. He also testified that when he drove the car he noticed nothing loose around the gear shift, even after he had the car detailed.

¶ 6 Defendant testified that he did not know there was cocaine in the Range Rover on the day he was stopped by Detective Gordon, nor did he know of any hidden compartments in the car. He claimed that he purchased the car from Nafees' brother, Anees, that Nafees was not there that day, and that Anees received the $5000 payment from him. He also claimed that he did not see a bill of sale, and that the bill of sale "just turned up" after he was arrested. However, defendant admitted that Nafees was the owner of the Range Rover. When defendant drove the car, he did not notice anything unusual about the gear shift. He admitted that he was carrying over $3,000 in cash when he was arrested.

¶ 7 The defense called Detective Gordon back to the stand. He testified that Nafees came to the police station on April 30, 2010, and told him that he was good friends with defendant. The defense then attempted to offer into evidence a certified copy of Anees' May 19, 2008, conviction for possession of cocaine, about three years before this trial was held. The court sustained the State's objection, stating that it was speculative as to whether or not Anees even had access to the car. In argument on defendant's motion for a new trial, defense counsel represented to the court that Anees' conviction was based on finding cocaine in the glove box of a car.

¶ 8 The State entered into evidence, as impeachment, certified copies of four of defendant's convictions for possession of marijuana. After final argument, the court convicted defendant of possession of cocaine and sentenced him to 18 months in prison. Defendant now appeals.

¶ 9 Defendant does not challenge the sufficiency of the evidence to convict him or the sentence imposed on him. He contends that the trial court erred when it did not permit the introduction of a certified copy of Anees' conviction for possession of cocaine. Defendant first contends that evidence of this conviction should have been admitted to impeach Nafees, by

showing that he had a reason to protect his brother. Defendant is apparently arguing that proof that Anees had been convicted of possession of cocaine about two years before defendant purchased the Range Rover would suggest that he had hidden the cocaine in the Range Rover before defendant received the car. This in turn might incriminate Anees, explaining why Nafees would testify that he did not know if Anees had driven the car before defendant obtained it. This argument was never made at trial or in post-trial motions and it is therefore forfeited. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). Even on the merits, defendant's argument does not show that the trial court erred in barring evidence of the conviction. The trial court's ruling on this issue is reviewed for abuse of discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984). Evidence should be excluded when it is too speculative to be relevant to trial issues. *People v. Limon*, 405 Ill. App. 3d 770, 772 (2010). The trial court properly found that the use of this conviction to impeach a person who did not even testify at trial should be denied because defendant's theory was too speculative. We find no abuse of discretion in this determination.

¶ 10 Defendant also contends that the evidence should have been admitted to demonstrate Anees' propensity to commit drug offenses in vehicles. The State responds the trial court did not abuse its discretion when it found that the connection between Anees and the cocaine was too speculative and excluded the evidence.

¶ 11 Defendant argues that our supreme court recognized in *People v. Cruz*, 162 Ill. 2d 314 (1994) that other crimes evidence could be used to establish the propensity of a third party to commit the crime of which the defendant was accused. However, although *Cruz* held that prejudice is not a relevant consideration because a third party is does not stand accused of a crime, the court never specifically held that such evidence was admissible solely to establish propensity. See *Cruz*, 162 Ill. 2d at 350-51; see also *People v. Turner*, 373 Ill. App. 3d 121, 130 (2007) (the supreme court's discussion in *Cruz* leaves somewhat ambiguous its stance as to

whether exculpatory other-crimes evidence could be admissible even where its only purpose is to show the propensities of another potential suspect). We need not decide the issue of whether such evidence is admissible simply to show propensity because we find that defendant failed to meet the minimum level of relevance to admit such evidence. *Cruz* held that to be admissible such evidence must contain " 'significant probative value.' " *Cruz*, 162 Ill. 2d at 350, quoting *People v. Tate*, 87 Ill. 2d 134, 143 (1981).

¶ 11a Defendant argues that a low standard of relevance applies because the evidence of Anees' prior drug conviction was offered to establish only propensity not *modus operandi*. However, our supreme court's recognition that prejudice is not a relevant consideration when determining whether to admit other-crimes evidence involving nonparties, cannot be interpreted as *carte blanche* to introduce whatever evidence defendant wishes unfettered by the requirements of relevance. As the second district observed in *Turner*:

> "[T]he supreme court did more than remove the prejudice component from the basic admissibility inquiry—it simultaneously heightened the requirement for probativeness. The rationale we discern for this change in the standard for probativeness is the idea that prejudice normally acts as an ersatz minimum probativeness requirement, because evidence with negligible probative value will often be excluded by even a limited amount of potential prejudice." *Turner*, 373 Ill. App. 3d at 131.

Here probativeness was lacking even under a propensity theory. The prior conviction was years old and, although it involved an automobile, it did not involve the use of hidden compartments. Accordingly, we find that defendant failed to establish that there was a sufficient nexus between Anees' prior crime and the offense with which defendant was charged. Because defendant never established a substantial link between Anees' conviction and the offense with which defendant

was charged, the trial court did not abuse its discretion in excluding evidence of the prior conviction. For these reasons, we affirm defendant's conviction.

¶ 12 Defendant also contends that the trial court erred in assessing a $200 DNA indexing fee against him because he was already registered in the DNA database pursuant to a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 302-303 (2011). The State concedes this contention and we therefore vacate that portion of the trial court's order assessing this fee against defendant.

¶ 13 For the reasons set forth in this order, we affirm defendant's conviction and sentence, but vacate that portion of the trial court's order which assessed a $200 DNA indexing fee against defendant.

¶ 14 Affirmed in part and vacated in part.